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SURGICAL SEARCH: REMOVING A SCAR ON THE FOURTH AMENDMENT

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I. INTRODUCTION

Court-ordered surgical removal of a bullet from the body of a criminal suspect[1] poses serious problems both for law enforcement officials and the judicial system when analyzed under the fourth amendment prohibition of unreasonable searches and seizures.[2] As with any search and seizure issue, the threshold determination is the reasonableness or unreasonableness of the proposed search.[3] The courts must establish the line between reasonable and unreasonable searches. This task of line-drawing is significant given that surgical searches are involuntary,[4] painful,[5] and may constitute potentially

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[1] The term surgical search will be used throughout this paper as a shorthand term summarizing the surgical removal of one or more bullets, under either local or general anesthetic, from the body of a defendant in a criminal case.

[2] As with all searches and seizures, surgical searches are conducted to recover evidence to be used in a criminal prosecution. In each of the cases surveyed in Part II, *see infra* notes 23-62 and accompanying text, the prosecution was seeking one or more bullets, embedded within the body of the suspect, intending to submit the bullet into evidence against him.

[3] The fourth amendment does not preclude all searches and seizures, only those searches and seizures judicially determined to be unreasonable:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

Regarding the scope of the fourth amendment, the Supreme Court has noted that "the [f]ourth [a]mendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner." Schmerber v. California, 384 U.S. 757, 768 (1966).

[4] All of the surgical search cases to date have involved nonconsenting defendants. The authors are not aware of any surgical searches performed pursuant to the defend-

dangerous intrusions[6] into the body of an individual presumed innocent by the very criminal justice system seeking to "break into the privacy"[7] of his physical being.

The uniquely intrusive nature of surgical searches is itself ample support for serious reflection by the legal system. The need for such reflection is enhanced when the issue of surgical searches is placed within the context of the expansive ambit of permissible, reasonable searches currently allowed under the fourth amendment. The Supreme Court has let stand, in the face of fourth amendment challenges, the following types of searches: stop-and-frisk searches;[8] wiretapping;[9] recorded eavesdropping;[10] monitoring personal use of a private telephone;[11] use of electronic tracking devices (viz. "beepers");[12] handwriting exemplars;[13] voice exemplars;[14] scrap-

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ant's consent. The constitutional problem would differ considerably from the one addressed here should the situation involve a defendant who initially consents to a surgical search, objecting only after the bullet is removed. Such a subsequent constitutional challenge would most likely be directed to the constitutionality of the consent. In all likelihood, the challenge would be predicated on an alleged violation of the defendant's fourteenth amendment procedural due process rights rather than on an alleged violation of the fourth amendment prohibition against unreasonable searches and seizures.

5 Surgeries clearly vary in the level of pain experienced by the patient. In this context, the reader should note that pain is associated with surgeries performed under local anesthesia. *See, e.g.*, Lee v. Winston, 717 F.2d 888, 905 (4th Cir. 1983) (Widener, J., dissenting), *cert. granted*, 104 S. Ct. 1906 (1984); United States v. Crowder, 543 F.2d 312, 321 n.32 (D.C. Cir. 1976) (Robinson, J., dissenting), *cert. denied*, 429 U.S. 1062 (1977).

6 The fourth amendment bright line regulating surgical searches is grounded in judicial concern about the differences in the extent of bodily intrusion and any resultant differential risk between surgical removal of bullets under local anesthetic and surgical removal under general anesthetic. *See infra* notes 21, 34, 46, 57, 83 and accompanying text; *see generally infra* notes 63-106 and accompanying text.

7 Rochin v. California, 342 U.S. 165, 172 (1952).

8 *See* Terry v. Ohio, 392 U.S. 1, 30 (1968).

9 *See* Katz v. United States, 389 U.S. 347, 354-56 (1967) (holding wire tapping pursuant to warrant constitutes reasonable search and seizure under fourth amendment).

10 *See* United States v. Caceres, 440 U.S. 741, 750 (1979) (finding no fourth amendment violation where conversations were intercepted by and recorded from radio transmitter worn by IRS agent proceeding in violation of IRS policy regarding eavesdropping); White v. United States, 401 U.S. 745, 751 (1971) (holding no fourth amendment violation where conversations were intercepted by and recorded from radio transmitter worn by law enforcement agent proceeding in absence of warrant).

11 *See* Smith v. Maryland, 442 U.S. 735, 745-46 (1979) (holding warrantless use of pen-register, a monitoring device attached to telephone line that records numbers of all outgoing calls, did not constitute a search within meaning of fourth amendment and did not violate fourth amendment's prohibition against unreasonable searches and seizures).

12 *See* United States v. Knotts, 460 U.S. 276, 281-82 (1983) (holding use of electronic "beeper" tracking device to monitor movement of drum of chloroform was not a search within meaning of fourth amendment and did not violate fourth amendment protection against unreasonable searches and seizures).

13 *See* United States v. Mara, 410 U.S. 19, 22 (1973).

14 *See* United States v. Dionisio, 410 U.S. 1, 15 (1973).

ings from fingernails;[15] bloodtests;[16] and body-cavity;[17] searches.[18]

These cases illustrate a clear, progressive movement into the physical being of the person, which had been thought to be protected by a constitutionally recognized zone of privacy.[19] It is this progressive expansion of what constitutes a reasonable search that requires a thoughtful analysis of surgical searches. Do surgical searches represent one further step in a shrinking zone of fourth amendment privacy? Or, do surgical searches represent the limit of reasonableness under the fourth amendment, establishing with firmness an inviolate zone of privacy?

This Article will review the major surgical search cases and demonstrate that the courts considering the question of surgical searches draw a bright line between those surgical searches that are to be performed under a local anesthetic and those that are to be performed under a general anesthetic. Those surgical searches to be performed under local anesthetic are held to be reasonable surgical searches under the fourth amendment.[20] Those surgical searches to be performed under general anesthetic are held to be unreasonable.[21] This Article will give particular attention to *Lee v.*

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15 *See* Cupp v. Murphy, 412 U.S. 291, 296 (1973). Similar search and seizures have been held constitutional in the face of fourth amendment challenges. *See, e.g.*, United States v. Smith, 470 F.2d 377, 380 (D.C. Cir. 1972) (penile swab of arrestee); Brent v. White, 398 F.2d 503, 505 (5th Cir. 1968) (penile tissue scraping from arrestee), *cert. denied*, 393 U.S. 1123 (1969) (the Chief Justice and Justice Douglas voting to grant certiorari on the basis of their dissents in *Schmerber*); United States *ex rel.* Parson v. Anderson, 354 F. Supp. 1060, 1087 (D. Del. 1972) (pubic hair sample from prisoner), *cert. denied*, 414 U.S. 1072 (1973); Ewing v. State, 160 Ind. App. 138, 147-48, 310 N.E.2d 571, 578-79 (1974) (urine sample from probationer).

16 *See* Schmerber v. California, 384 U.S. 757, 771 (1965).

17 *See* United States v. Shields, 453 F.2d 1235 (9th Cir. 1972) (holding body cavity search permissible where there exists clear indication or plain suggestion of presence of concealed contraband), *cert. denied*, 406 U.S. 910 (1972); Rivas v. United States, 368 F.2d 703 (9th Cir. 1966) (same holding as in *Shields*), *cert. denied*, 386 U.S. 945 (1967).

18 The constitutionality of strip searches has not been ruled upon directly by the Supreme Court. *See* Illinois v. Lafayette, 103 S. Ct. 2605, 2609 n.2 (1983) (holding search of arrestee's shoulder bag permissible where it constitutes routine procedure prior to incarceration, but noting that Court was not addressing circumstances in which strip searches would be appropriate).

19 *See infra* notes 86-92 and accompanying text.

20 *See Crowder*, 543 F.2d at 312; Hughes v. United States, 429 A.2d 1339 (D.C. 1981); Doe v. State, 409 So. 2d 25 (Fla. Dist. Ct. App. 1982); Creamer v. State, 229 Ga. 511, 192 S.E.2d 350 (1972); State v. Lawson, 187 N.J. Super. 25, 453 A.2d 556 (1982); State v. Allen, 277 S.C. 595, 291 S.E.2d 459 (1982). *See also* State v. Martin, 404 So. 2d 960 (La. 1981) (approving state's request to appoint panel of doctors to examine feasibility of removing bullet from defendant's head where unknown at time whether anesthetic would be local or not).

21 *See* Bowden v. State, 256 Ark. 820, 510 S.W.2d 879 (1974); State v. Overstreet,

551 S.W.2d 621 (Mo. 1977); People v. Smith, 80 Misc. 2d 210, 362 N.Y.S.2d 909 (Sup. Ct. 1974).

Courts have simplified the complexities of anesthesia by utilizing the distinction between local and general anesthesia. This distinction may facilitate the initial framing of legal issues when they are posed by a case of first impression. In such a context, dichotomizing local and general anesthesia can be a valid point of departure. This may, however, direct attention away from other legal concerns that could be raised with respect to surgical searches. These concerns relate to (a) whether or not the legal issues vary with the use of each type of anesthesia, (b) the range of anesthesia that can be induced by both local and general anesthetics, (c) the manner of anesthetic induction, and (d) the relative risk of local and general anesthesia, an issue considered at greater length at *infra* notes 83-84 and accompanying text. Thus, it is important to be aware of distinctions that may be missed by the shorthand use of the medical terms local and general anesthesia.

Local anesthesia is anesthesia that reduces or eliminates the perception of pain without affecting consciousness. Local anesthesia is categorized as (1) local infiltration anesthesia, injection of anesthesia directly into the operative site, and (2) regional (also known as conductive) anesthesia, anesthesia affecting an entire structural-functional area of the body by injection directed to the nerve(s) serving the surgical site. Another form of local anesthesia, topical anesthesia, is inapplicable to surgical searches because it is used only to anesthetize mucous tissue, e.g., eyes, nose, throat, urethra, and is applied directly to mucous tissue. *See* R. GRAY & L. GORDY, ATTORNEY'S TEXTBOOK OF MEDICINE §§ 58.50-.51(1)-(3) (3d ed. 1983); LAWYER'S MEDICAL CYCLOPEDIA OF PERSONAL INJURIES AND ALLIED SPECIALTIES §§ 25.26-.31 (3d ed. 1983) [hereinafter cited as LAWYER'S MEDICAL CYCLOPEDIA]. *See also* R. DRIPPS, J. ECKENHOFF & L. VANDAM, INTRODUCTION TO ANESTHESIA 242-308 (1977) (pt. C: Regional Anesthesia).

Both local infiltration and regional anesthesia, by definition, desensitize the area surrounding the site of surgery. LAWYER'S MEDICAL CYCLOPEDIA, *supra*, at § 25.26. Both local infiltration and regional anesthesia are induced by pharmacological local anesthetics. R. GRAY & L. GORDY, *supra*, at §§ 58.51(1)-.51(3b); LAWYER'S MEDICAL CYCLOPEDIA, *supra*, at §§ 25.28-.31. There are, however, significant differences between local infiltration and regional anesthesia in the mode of induction and in the types of operations that can be performed under each. To illustrate, local infiltration use of local anesthesia desensitizes the peripheral nerves of only a delimited area of the body and is induced by a direct injection into and around the surgical site. R. GRAY & L. GORDY, *supra*, at § 58.51(1); LAWYER'S MEDICAL CYCLOPEDIA, *supra*, at § 25.28. Regional use of local anesthesia desensitizes a much larger area of the body, however, the entire area served by the nerve(s) selected for desensitization. This type of local anesthesia is delivered by an injection: (1) at the base of the nerve(s) to be desensitized; (2) into the epidural space; or (3) into the cerebrospinal fluid. R. DRIPPS, J. ECKENHOFF & L. VANDAM, *supra*, at pt. C; R. GRAY & L. GORDY, *supra*, at § 58.51(3); LAWYER'S MEDICAL CYCLOPEDIA, *supra*, at §§ 25.29-.31. Thus, local anesthesia can be used as a nerve block in the facial area, cervical (neck) area, upper rib and clavicle (collar bone) area, etc. R. DRIPPS, J. ECKENHOFF & L. VANDAM, *supra*, at ch. 20; LAWYER'S MEDICAL CYCLOPEDIA, *supra*, at § 25.28.

Local anesthesia may be employed to desensitize an entire structural-functional region, for example, the thoracic region (the thoracic or upper chest area); the caudal-sacral region (the area encompassing the inner thighs, anus, rectum, and genitalia); or the lumbar region (the lower abdominal and pelvic area). R. DRIPPS, J. ECKENHOFF & L. VANDAM, *supra*, at ch. 19; R. GRAY & L. GORDY, *supra*, at § 58.51(3a). There are two modes of induction for this use of local anesthesia. One mode is via injection into the epidural space: the space between the covering of the spinal cord and the bony canal formed by vertebrae. In this mode of induction, nerve(s) are affected after exiting the covering of the spinal cord. R. DRIPPS, J. ECKENHOFF & L. VANDAM, *supra*, at ch. 19; R.

GRAY & L. GORDY, *supra*, at § 58.51(3a); LAWYER'S MEDICAL CYCLOPEDIA, *supra*, at § 25.31.

The second mode of induction is by injection of local anesthesia into the cerebrospinal fluid so that nerves are affected at the point of exiting the spinal cord. Local anesthesia, used as spinal anesthesia, can, depending on concentration, affect all nerve groups below the diaphragm and above the sacrum (the large bone at the base of the spine). R. DRIPPS, J. ECKENHOFF & L. VANDAM, *supra*, at ch.18; R. GRAY & L. GORDY, *supra*, at § 58.51(3b); LAWYER'S MEDICAL CYCLOPEDIA, *supra*, at § 25.30. In addition, spinal use of local anesthesia affects the autonomic nervous system, the nervous system that is involved in regulating the heart, blood pressure, respiration, body temperature, the so-called fight-or-flight response, and behavior and emotional functioning.

Although all of the above-outlined anesthetic procedures deliver local anesthesia and affect only certain areas of the body, there are major differences between local infiltration and regional anesthesia. Thus, under regional, but not local infiltration, local anesthesia, major surgical procedures can be performed, such as a full range of abdominal surgeries. R. GRAY & L. GORDY, *supra*, at § 58.51(3); LAWYER'S MEDICAL CYCLOPEDIA, *supra*, at § 25.31.

The legal concept of major and minor bodily intrusions, employed to distinguish between surgical searches performed under general and local anesthesia, obscures legal cognizance of the extent of bodily intrusions possible under local anesthesia. *see Schmerber*, 384 U.S. at 771 (leaving open question whether "fear," "health," or "religious scruples" might render a minor procedure too intrusive); *see also infra* notes 23-62 and accompanying text. It is clear that both major and minor intrusions can and do occur under local anesthesia. *See infra* notes 107-120 and accompanying text.

The same blurring of legally significant distinctions occurs in the undifferentiated use of the term general anesthesia by courts considering surgical search cases. Such undifferentiated use focuses attention on the perceived life-threatening dangers of unconsciousness induced by general anesthesia, obscuring the medical fact that there are degrees of surgical unconsciousness, only two of which pose the life-threatening dangers usually evoked by the term general anesthesia. *See* R. DRIPPS, J. ECKENHOFF & L. VANDAM, *supra*, at 232-36; R. GRAY & L. GORDY, *supra*, at §§ 58.70-.74. Indeed, although general anesthesia can be life-threatening, it is not usually so. Thus, surgeries performed under general anesthesia are performed at a stage that is not life-threatening. *See* R. DRIPPS, J. ECKENHOFF & L. VANDAM, *supra*, at 234-35; R. GRAY & L. GORDY, *supra*, at § 58.73. Furthermore, little or no legal cognizance is accorded to the medical fact that minor as well as major surgical procedures are performed under general anesthesia. *See* R. GRAY & L. GORDY, *supra*, at § 58.52. Indeed, use of general anesthesia for minor surgery facilitates the surgery and minimizes the damage to nerves, muscles, and blood vessels. This is the case because of the body's relaxed state under general anesthesia, which permits the surgeon to move these structures out of the way rather than cut through them, as would be the case with local anesthesia. *See infra* note 84.

The conclusion is that the use of local versus general anesthesia does not necessarily identify minor versus major bodily intrusions and, hence, is not a legally valid system of categorizing such intrusions. Yet, the courts hearing surgical search cases have made such an identification, obscuring the central legal issue of when a surgical search ceases to be reasonable. *See infra* notes 44, 66 and accompanying text.

Some surgical searches may be reasonable under the fourth amendment. *See infra* notes 107-120 and accompanying text. If a surgical search ceases to be reasonable when the bodily intrusion entailed in the search is major, such an intrusion cannot be measured by the type of anesthesia to be utilized because major intrusions can occur with certain uses of local anesthesia as well as with the use of general anesthesia. Thus, if the use of general anesthesia is to function as the bright line separating reasonable from unreasonable searches, its underlying rationale cannot be wedded to the extent and associated risks of the bodily intrusion.

A final point, considered more fully at *infra* note 83, is the relative risk associated

Winston,[22] the most recent appellate court decision drawing the bright line against the use of general anesthesia to perform a surgical search. In examining the development of the bright line prohibition of general anesthesia in surgical search cases, this Article will examine the principal legal rationales supporting this prohibition. Closing remarks will articulate proposed rules applicable to the fourth amendment analysis of the use of both general and local anesthetic surgical searches.

II. SUPREME COURT PRECEDENT: THE *ROCHIN* AND *SCHMERBER* STANDARDS

The United States Supreme Court has not directly addressed the constitutionality of surgical searches. In *Rochin v. California*[23] and *Schmerber v. California*,[24] however, the Court did address the constitutionality of bodily intrusive searches conducted to secure evidence for subsequent prosecutions. In *Rochin*,[25] the Court held that pumping the stomach of the defendant without his consent, in order to recover swallowed evidence, was an unconstitutional bodily intrusion.[26] In *Schmerber*,[27] the Court found the challenged bodily intru-

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with local and general anesthesia. Medically, risk is associated with the condition of the patient, not with the principal anesthesia employed—local or general. The healthier the patient, the lower the risk, regardless of the use of general or local anesthesia. R. DRIPPS, J. ECKENHOFF & L. VANDAM, *supra*, at 14-15.

22 Lee v. Winston, 717 F.2d 888 (4th Cir. 1983), *aff'g* 551 F. Supp. 247 (E.D. Va. 1982), *cert. granted*, 104 S. Ct. 1906 (1984).

23 342 U.S. 165 (1952).

24 384 U.S. 757 (1966).

25 342 U.S. at 165. In *Rochin*, three deputy sheriffs, acting on "information that [Rochin] was selling narcotics," entered Rochin's home and located him in a bedroom. *Id.* at 166. On a table adjacent to the bed, the deputies noticed two capsules. When the deputies inquired about their contents, Rochin placed them in his mouth and eventually swallowed them. *Id.* The deputies immediately seized Rochin and physically attempted to extricate the capsules from his mouth. When their efforts failed, the deputies transported Rochin to a hospital and, without his consent, had his stomach pumped. *Id.* Analysis of the contents of Rochin's stomach revealed the presence of morphine. The morphine so obtained constituted the principal evidence for his conviction. *Id.* at 166-67.

26 *Rochin* was decided on fourteenth amendment procedural due process grounds, rather than on fourth amendment unreasonable search and seizure grounds. *See Rochin*, 342 U.S. at 168-69, 174. The *Rochin* decision was rendered before the fourth amendment had been applied to the states through the fourteenth amendment. *See* Wolf v. Colorado, 338 U.S. 25, 26-27 (1949). Even though the standard of review applied in *Rochin* was the "concept of ordered liberty," *Rochin*, 342 U.S. at 169 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)), the "shocks the conscience" and "rack and screw" approach, *see infra* notes 38-39 and accompanying text, has been converted into a standard of review by many of the courts hearing cases on surgical searches that have been challenged as unreasonable under the fourth amendment. *See, e.g.*, Lee v. Winston, 717 F.2d 888, 901 (4th Cir. 1983) [hereinafter cited as *Lee II*], *cert. granted*, 104 S. Ct. 1906 (1984); United States v. Crowder, 543 F.2d 312, 316 (D.C. Cir. 1976), *cert.*

sion—involuntary withdrawal of blood used to ascertain its blood-alcohol content[28]—constitutional.[29]

Rochin and *Schmerber* are the only Supreme Court cases available to guide lower federal courts and state courts faced with the issue of whether or not surgical bodily intrusions are permissible when challenged as violative of the fourth amendment prohibition against un-

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denied, 429 U.S. 1062 (1977); Lee v. Winston, 551 F. Supp. 247, 259-61 (E.D. Va. 1982) [hereinafter cited as *Lee I*], *aff'd*, 717 F.2d 888 (4th Cir. 1983), *cert. granted*, 104 S. Ct. 1906 (1984); Bowden v. State, 256 Ark. 820, 822, 510 S.W.2d 879, 880 (1974); Adams v. State, 260 Ind. 663, 666, 299 N.E.2d 834, 836 (1973), *cert. denied*, 415 U.S. 935 (1974); State v. Richards, 585 S.W.2d 505, 506 (Mo. 1979); State v. Lawson, 187 N.J. Super. 25, 29, 453 A.2d 556, 558 (Super. Ct. App. Div. 1982); State v. Allen, 277 S.C. 595, 597, 291 S.E.2d 459, 460 (1982).

27 *Schmerber*, 384 U.S. at 757.

28 In *Schmerber*, defendant-appellant Schmerber, along with a companion, had been drinking at a "tavern and bowling alley." Upon leaving, Schmerber and his companion got into a car with Schmerber driving. The automobile "skidded, crossed the road, and struck a tree." *Id.* at 758 n.2. Schmerber was taken to a hospital and treated for injuries sustained in the accident.

A policeman who investigated the accident both at the scene and at the hospital later testified that Schmerber's breath smelled of alcohol and that his eyes "were 'bloodshot, watery, sort of glassy in appearance.' " *Id.* at 768-69. The officer arrested Schmerber at the hospital and ordered the attending physician to withdraw blood for analysis of its blood-alcohol content. *Id.* at 758. Schmerber did not consent to the blood test. The subsequent blood analysis indicated that Schmerber was intoxicated at the time of the accident. A report of the analysis was admitted into evidence at Schmerber's trial. *Id.* at 759.

29 The defendant-appellant in *Schmerber* claimed four specific constitutional violations: procedural due process under the fourteenth amendment; self-incrimination under the fifth amendment; right to counsel under the sixth amendment; and unreasonable search and seizure under the fourth amendment. The Court held that the involuntary withdrawal of Schmerber's blood in order to ascertain its blood-alcohol content was permissible under each of the constitutional provisions alleged to have been violated. *Id.* at 771-72. The Court's holding on the search and seizure claim is of principal significance because it formulated the basic structure of what has become the standard of review for surgical searches. *See Lee II*, 717 F.2d at 899, 901; *Crowder*, 543 F.2d at 316; Hughes v. United States, 429 A.2d 1339, 1340 (D.C. 1981); Doe v. State, 409 So. 2d 25, 26-27 (Fla. Dist. Ct. App. 1982); Creamer v. State, 229 Ga. 511, 514, 192 S.E.2d 350, 352-53 (1972); *Richards*, 585 S.W.2d at 506; *Lawson*, 187 N.J. Super. at 28-29, 453 A.2d at 558; *Allen*, 277 S.C. at 602-03, 291 S.E.2d at 463.

Courts finding surgical searches unreasonable have utilized the *Schmerber* opinion as the operative standard of review, either standing alone or in conjunction with the *Rochin* standard of review. *See Bowden*, 256 Ark. at 822-23, 510 S.W.2d at 881; *Smith*, 80 Misc. 2d at 215, 362 N.Y.S.2d at 913-14 (1974); *Allen*, 277 S.C. at 597, 291 S.E.2d at 460-61.

The *Schmerber* Court defined a minor bodily intrusion as one that "involves virtually no risk, trauma, or pain." *Schmerber*, 384 U.S. at 771. A minor bodily intrusion must be performed "by a physician in a hospital environment according to accepted medical practices." *Id.* The Court clearly identified the circumstances that would justify a minor bodily intrusive search: there must be "a clear indication that in fact [desired] evidence will be found." *Id.* at 770. The Court closed its opinion with an affirmation of the value accorded by our culture to the "integrity of an individual's person," noting that its decision must not be construed as countenancing "more substantial intrusions or intrusions under other conditions." *Id.* at 772.

reasonable searches and seizures.[30] All courts considering the constitutionality of surgical searches have taken *Rochin* and *Schmerber* as their analytical base, relying on one or both in reaching their decisions.[31]

A court compares the facts of a given case to both *Rochin* and *Schmerber*.[32] If the case approximates *Rochin*, the surgical search is held unreasonable.[33] If it falls within the parameters of *Schmerber*, one of two outcomes is possible. If the surgical search is deemed a *minor bodily intrusion*, it is held reasonable.[34] If the surgical search is deemed to constitute a *major bodily intrusion*, it is held to be unreasonable.[35]

The Court in *Rochin*, applying the concept of ordered liberty as

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30 *See infra* note 54 and accompanying text.

31 *See supra* notes 26 & 29.

32 *See Lee II*, 717 F.2d at 899; *Crowder*, 543 F.2d at 316; *Lee I*, 551 F. Supp. at 259-61; *Bowden*, 256 Ark. at 822-23, 510 S.W.2d at 879-80; *Doe*, 409 So. 2d at 27-28; *Adams*, 260 Ind. at 666-68, 299 N.E.2d at 836-37; *Overstreet*, 551 S.W.2d at 625, 627-28; *Lawson*, 187 N.J. Super. at 29, 453 A.2d at 558; *Smith*, 80 Misc. 2d at 214, 362 N.Y.S.2d at 912-13; *Allen*, 277 S.C. at 597, 291 S.E.2d at 460-61.

33 *See Lee II*, 717 F.2d at 901 ("the procedure contemplated is more akin to the impermissible activity of *Rochin* than to the minor intrusion in *Schmerber*. In short '[t]hese are methods too close to the rack and screw to permit of constitutional differentiation.' ") (quoting *Lee I*, 551 F. Supp. at 261); *Adams*, 260 Ind. at 666, 299 N.E.2d at 836 (court found *Rochin* opinion controlling); *Smith*, 80 Misc. 2d at 215, 362 N.Y.S.2d at 914 ("the use of the surgical knife to the extent indicated in this case is offensive to the sense of fair play and decency and the American way of life").

34 *See Crowder*, 543 F.2d at 316. The court in *Crowder* explicitly rejected the *Rochin* standard, adopting the basic *Schmerber* standard but incorporating additional safeguards. *See infra* note 118 and accompanying text.

It is important to note that the *Crowder* opinion substantially expanded the procedural requirements established by the Supreme Court in *Schmerber* to secure a surgical search. The court in *Crowder* required an adversarial hearing on the propriety of the surgical search itself and appellate review prior to execution of the surgical search. The *Schmerber* standard, as expanded by the *Crowder* opinion, constitutes what can be termed the *Schmerber-Crowder* standard. It has been utilized in three surgical search cases. *See Richards*, 585 S.W.2d at 506; *Overstreet*, 551 S.W.2d at 626-27; *Lawson*, 187 N.J. Super. at 28-29, 453 A.2d at 558-59. *See also Doe*, 409 So. 2d at 27 (court, applying *Schmerber* and also citing *Crowder*, held "mere chance" of bullet's evidentiary value rendered search unreasonable); *Allen*, 277 S.C. at 603, 291 S.E.2d at 463 (court, applying *Schmerber* standard, held proposed surgical search of first defendant unreasonable under fourth amendment because it "involv[ed] a substantial intrusion into his body and risk to his health, safety or life" and upheld proposed surgical search of second defendant as minor bodily intrusion).

35 *See Bowden*, 256 Ark. at 823-24, 510 S.W.2d at 881 ("the proposed operation constitutes medically a major intrusion into petitioner's body involving trauma, pain and possible risk of life even when performed in a proper medical environment with the most careful and skilled attention"); *Overstreet*, 551 S.W.2d at 626-27 (judicial delegation of determination of reasonableness to surgeon evaluating risks fails *Schmerber* test); *Allen*, 277 S.C. at 603, 291 S.E.2d at 463 (major surgery for bullet removal "involving a substantial intrusion into [defendant's] body and risk to his health, safety or life" fails *Schmerber* test).

its standard of review,[36] held that the legally unauthorized[37] pumping of the defendant-appellant's stomach constituted

> *conduct that shocks the conscience.* Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. *They are methods too close to the rack and screw to permit of constitutional differentiation.*[38]

The ideas expressed in this passage have been employed as a standard by courts hearing or reviewing surgical searches.[39] *Rochin* and its language have expressly been invoked by all courts holding surgical searches unreasonable under the fourth amendment.[40]

The Court, in its *Schmerber* opinion, utilized different language to validate the bodily intrusion caused by an involuntarily administered blood test. The *Schmerber* decision focused less on the circumstances of the bodily intrusion, as was the case in *Rochin*, and more on the impact of the intrusion on the defendant. The Court held that a blood test constituted a reasonable search under the fourth amendment because it was a minor bodily intrusion "involv[ing] virtually no risk, trauma, or pain . . . [when] performed in a reasonable manner . . . by a physician in a hospital environment according to accepted medical practices."[41] From this language, the minor-major intrusion standard of review has evolved and has been employed by all courts that have validated surgical searches challenged as unreasonable under the fourth amendment.[42]

The standards of review that have evolved from the Court's language in both *Rochin* and *Schmerber* appear to acknowledge the sanctity of the defendant's body,[43] and to recognize the dilemma posed

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[36] *Rochin*, 342 U.S. at 169.

[37] *See supra* note 26.

[38] *Rochin*, 342 U.S. at 172 (emphasis supplied).

[39] *See Lee II*, 717 F.2d at 901; *Crowder*, 543 F.2d at 316; *Bowden*, 256 Ark. at 823, 510 S.W.2d at 880; *Adams*, 260 Ind. at 666, 299 N.E.2d at 836; *Richards*, 585 S.W.2d at 506; *Lawson*, 187 N.J. Super. at 29, 453 A.2d at 558; *Smith*, 80 Misc. 2d at 214, 362 N.Y.S.2d at 913; *Allen*, 277 S.C. at 597, 291 S.E.2d at 460.

[40] *See supra* note 33.

[41] *Schmerber*, 384 U.S. at 771. The *Schmerber* Court construed the challenged blood test as a minor bodily intrusion based on the application of the following two-step standard of review: (1) *justification* considered in terms of a clear indication that specific, desired evidence is contained within the body; and (2) *reasonable procedures* for securing the evidence as defined by "accepted medical practices." *Id.* at 768, 770-71. *See also supra* note 28.

[42] *See Crowder*, 543 F.2d at 316; *Hughes*, 429 A.2d 1339, 1340; *Doe*, 409 So. 2d at 28; *Creamer*, 229 Ga. at 514-15, 192 S.E.2d at 351; *Richards*, 585 S.W.2d at 506; *Lawson*, 187 N.J. Super. at 29, 453 A.2d at 559; *Allen*, 277 S.C. at 603, 291 S.E.2d at 463.

[43] *See Schmerber*, 384 U.S. at 769-70, 772 (noting that fourth amendment precludes unreasonable searches and seizures in order to protect "[t]he interests in human dignity

by permitting bodily intrusive searches that, by definition, violate the body's sanctity. This dilemma is framed even more starkly by surgical searches.

Surgical searches are per se intrusive. The functional nature of the surgical scalpel is to intrude, by incision, into the body. It does so whatever its articulated purpose—to heal or to seek evidence of guilt. And, although its intrusive nature may be mitigated by the consent of the patient or judicial supervision, it remains intrusive.[44]

The sanctity of the body, however, is not the only value to be considered in assessing the reasonableness of bodily intrusive searches. The Supreme Court, in both *Rochin* and *Schmerber*, recognized that the sanctity of the body is not absolute.[45] In each opinion, the Court impliedly acknowledged that the defendant's interest in the sanctity of his body, as well as his interest in controlling the presentation of and access to his body, may be required to yield before society's interest in seeking and securing the evidence necessary to prosecute criminal offenses against it.[46]

The same balancing process employed by the Supreme Court in *Rochin* and *Schmerber* is embodied in the standards of review that have evolved from these opinions. The interest of the defendant in the sanctity of his body is controlling where a bodily intrusive search "shocks the conscience" or where it constitutes a major intrusion in terms of the extent of risk, trauma, and pain accompanying the search.[47] The interest of society in vigorous law enforcement is controlling where the search constitutes a minor bodily intrusion.[48] But

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and privacy" and reaffirming "the integrity of an individual's person [as] a cherished value of our society"); *Rochin*, 342 U.S. at 172, 174 (referring to "the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents").

44 This conclusion is based on the recognition that virtually all courts considering the question of surgical search, whether or not such searches are held reasonable or unreasonable under the fourth amendment, characterize them as intrusive and occasionally as invasive. *See Lee II*, 717 F.2d at 899, 901; *Crowder*, 543 F.2d at 316; *Lee I*, 551 F. Supp. at 259-61; *Bowden*, 256 Ark. at 823, 510 S.W.2d at 881; *Hughes*, 429 A.2d at 1340; *Doe*, 409 So. 2d at 28; *Creamer*, 229 Ga. at 514, 192 S.E.2d at 353; *Adams*, 260 Ind. at 668, 299 N.E.2d at 837; *Overstreet*, 551 S.W.2d at 628; *Lawson*, 187 N.J. Super. at 29, 453 A.2d at 558; Bloom v. Starkey, 65 A.D.2d 763, 764, 409 N.Y.S.2d 773, 774 (1978); *Smith*, 80 Misc. 2d at 215, 362 N.Y.S.2d at 914; *Allen*, 277 S.C. at 602, 291 S.E.2d at 463.

45 *See Schmerber*, 384 U.S. at 768; *Rochin*, 342 U.S. at 171, 174.

46 *See Schmerber*, 384 U.S. at 768, 770-71; *Rochin*, 342 U.S. at 171, 174.

47 *See supra* notes 29, 33, 35 and accompanying text.

48 *See supra* notes 29, 34 and accompanying text. Virtually all of the surgical search cases involve persons suspected of or prosecuted for serious criminal offenses. *See Crowder*, 543 F.2d at 312 (defendant convicted of second degree murder, robbery, and carrying dangerous weapon); *Lee I*, 551 F. Supp. at 248 (prosecution of defendant for malicious wounding, attempted robbery, and use of firearm); *Bowden*, 256 Ark. at 821, 510 S.W.2d at 879 (defendant suspected of murder and robbery); *Hughes*, 429 A.2d at

despite this similarity of philosophy between the *Rochin* and *Schmerber* standards of review for bodily intrusive searches, the standards are separate and distinct.

The "shocks the conscience" standard of *Rochin* focuses on the improper methods employed to implement a bodily intrusive search. In *Rochin*, an otherwise minor medical procedure, pumping a stomach,[49] is constitutionally invalid because of the impropriety of the procedures utilized by law enforcement personnel to secure the evidence.[50] The *Rochin* standard for invalidating bodily intrusive searches is thus a procedural standard.[51] On the other hand, the *Schmerber* minor intrusion standard goes beyond the law enforcement procedures utilized in any given bodily intrusive search to an examination of the medically assessed risk of such a search as defined by the medical procedures involved.[52]

It seems reasonable to suggest, on this analysis, that the *Rochin* standard is primarily a legal standard, while the *Schmerber* standard is a medico-legal one. The contours of the *Schmerber* standard can be expected to shift on the basis of changes in either medical knowledge of what constitutes major and minor bodily intrusions or in the legal analysis of what constitutes reasonable and unreasonable bodily intrusive searches. The contours of the *Rochin* standard, however, can be expected to shift only if there is a change in fourth amendment search and seizure analysis.[53]

The *Rochin* and *Schmerber* opinions constitute the foundation of

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1339 (prosecution of defendant for murder and armed robbery); *Doe*, 409 So. 2d at 25 (defendant suspected of murder and attempted armed robbery); *Creamer*, 229 Ga. at 512, 192 S.E.2d at 351 (prosecution of defendant for double murder); Allison v. State, 129 Ga. App. 364, 364, 199 S.E.2d 587, 588 (1973) (defendant convicted of criminal attempt to commit robbery by force), *cert. denied*, 404 U.S. 1156 (1973); *Adams*, 260 Ind. at 664, 299 N.E.2d at 835 (defendant convicted of premeditated murder and felony murder); State v. Martin, 404 So. 2d 960, 961 (La. 1981) (defendant indicted for second degree murder of wife in domestic dispute); *Richards*, 585 S.W.2d at 505 (defendant convicted of felony murder); *Overstreet*, 551 S.W.2d at 621 (defendant convicted of first degree murder and first degree robbery); *Lawson*, 187 N.J. Super. at 26, 453 A.2d at 557 (defendant prosecuted for murder); *Smith*, 80 Misc. 2d at 211, 362 N.Y.S.2d at 910 (defendant suspected of murdering police officer); *Allen*, 277 S.C. at 596, 291 S.E.2d at 459 (two defendants charged with murder and attempted armed robbery along with other criminal offenses).

49 *See generally* DAVIS-CHRISTOPHER TEXTBOOK OF SURGERY (D. Sabiston 12th ed. 1981).

50 *See supra* note 25 and accompanying text.

51 *Rochin*, 342 U.S. at 168-69, 172 (noting that due process clause of fourteenth amendment imposes requirements on criminal procedure used by states and referring to proceedings utilized to convict Rochin).

52 *See Schmerber*, 384 U.S. at 771-72 (noting that surgery was performed under proper medical supervision).

53 *See infra* notes 63-120 and accompanying text.

two distinct standards of review for addressing two distinct problems raised by bodily intrusive searches: first, the constitutionality of the law enforcement procedures utilized to conduct such searches; and second, the constitutionality of a specific bodily invasion as determined by the medical procedures required for its performance. And because *Rochin* and *Schmerber* are the only Supreme Court decisions on the subject of bodily intrusive searches,[54] courts considering the fourth amendment reasonableness of surgical searches have invoked these opinions, fashioning them into standards of review. In the process, the original distinction between the *Rochin* and *Schmerber* opinions—law enforcement procedure, on the one hand, medical procedure, on the other—has faded.

This consequence is due to a shift in the perceived legal question. For the Supreme Court in *Rochin* and *Schmerber*, the perceived legal question was the constitutionality of involuntary bodily intrusions.[55] The nature of this question required the Court to scrutinize both legal and medical procedures. In doing so, the Court applied differing standards of review to procedural matters it viewed as distinct—legal procedures, on the one hand; medical procedures, on the other.

For contemporary courts considering the reasonableness of surgical searches, the perceived legal question has changed. The issue has become the constitutionality of a specific type of bodily intrusive search—the surgical search. Thus, a central focus of the *Schmerber* Court, the reasonableness of medical procedures utilized in bodily intrusive searches, has become paramount to courts considering the reasonableness of surgical searches. And of all the medical procedures implicated in surgical searches, those related to anesthesia receive the most attention. These courts have come to view questions of anesthesia as central and, perhaps, dispositive of the reasonableness of surgical searches. In this regard, the original focus of *Rochin*, the constitutionality of procedures followed by law enforcement personnel, has become less and less prominent. *Rochin*, however, does retain vitality with respect to surgical search cases because of its clear insistence that the dignity of the defend-

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[54] The United States Supreme Court has not reviewed the constitutionality of another line of bodily intrusive searches, body cavity searches for contraband, usually illicit drugs, conducted at U.S. ports of entry. *See* United States v. Shields, 453 F.2d 1235 (9th Cir.), *cert. denied*, 406 U.S. 910 (1972); Rivas v. United States, 368 F.2d 703 (9th Cir. 1966), *cert. denied*, 386 U.S. 945 (1967).

[55] Most cases involving surgical searches fall into the category of first impression. Should a surgical search case come before the Supreme Court, it would be one of first impression despite *Rochin* and *Schmerber*.

ant's body merits constitutional recognition and protection.[56]

Courts considering the reasonableness of surgical searches have converged in holding surgical searches reasonable when performed with local anesthesia under the minor intrusion rationale of *Schmerber*.[57] By a similar convergence, surgical searches requiring general anesthesia are held unreasonable because they violate the "shocks the conscience" rationale of *Rochin*,[58] because they constitute major intrusions under *Schmerber*,[59] or because they violate both rationales.[60]

This judicial consensus appears to be approaching promulgation of a per se rule against those surgical searches requiring general anesthesia.[61] The most recent surgical search decision, *Lee v. Winston*,[62] supports this view.

III. *LEE V. WINSTON:* TOWARD A PER SE RULE PRECLUDING GENERAL ANESTHETIC SURGICAL SEARCHES

A. DISTRICT COURT DECISION

The *Lee* case presented the Court of Appeals for the Fourth Circuit with its first surgical search question. The defendant, Rudolph Lee, was shot in the left side of his chest during the alleged perpe-

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56 *See Rochin*, 342 U.S. at 174.

57 *See Crowder*, 543 F.2d at 316 (upholding as minor intrusion surgical search under local anesthetic for bullet lodged in defendant's forearm but disallowing surgical search for bullet lodged in thigh as major intrusion because of possibility of permanent injury); *Hughes*, 429 A.2d at 1340 & n.2 (permitting as minor intrusion surgical search using local anesthesia); *Doe*, 409 So. 2d at 28 (permitting as minor intrusion surgical search using local anesthesia); *Creamer*, 229 Ga. at 514, 192 S.E.2d at 353 (permitting as minor intrusion surgical search using local anesthesia); *Lawson*, 187 N.J. Super. at 29, 453 A.2d at 557-58 (permitting as minor intrusion surgical search for bullet using local anesthesia); *Allen*, 277 S.C. at 602-03, 291 S.E.2d at 463 (permitting surgical search performed under local anesthesia as to first defendant as minor intrusion, but denying as major intrusion surgical search of second defendant requiring general anesthesia and considered by two surgeons to be major surgical procedure). *But see Crowder*, 543 F.2d at 320-24 (Robinson, J., dissenting).

58 *See Lee I*, 551 F. Supp. at 260; *Smith*, 80 Misc. 2d at 214, 362 N.Y.S.2d at 913.

59 *See Bowden*, 256 Ark. at 823-24, 510 S.W.2d at 881. *See also Overstreet*, 551 S.W.2d at 626-28 (surgical search unreasonable under *Schmerber-Crowder* standard due in part to absence of adversary hearing).

60 *Lee II*, 717 F.2d at 901 (finding proposed surgical search unreasonable under both *Schmerber* ("[t]he proposed surgery is too intrusive and presents too great a risk") and *Rochin* ("methods too close to the rack and screw to permit of constitutional differentiation")).

61 The Supreme Court of Indiana has adopted a per se unreasonable rule against both local and general anesthetic surgical searches. *See Adams*, 260 Ind. at 669, 299 N.E.2d at 838.

62 Lee v. Winston, 717 F.2d 888 (4th Cir. 1983) [*Lee II*], *aff'g* 551 F. Supp. 247 (E.D. Va. 1982), *cert. granted*, 104 S. Ct. 1906 (1984).

tration of two felonies, attempted robbery and malicious wounding.[63] Subsequent to Lee's indictment for these crimes, the state sought the surgical removal of the bullet lodged in his chest[64] for possible use as evidence.[65]

The federal district court initially granted the state's request for the surgical search, applying the *Schmerber* standard of review and finding that the state had complied with each element of the standard.[66] The federal district court found that the proposed surgical search, to be performed under local anesthetic, constituted a minor intrusion with virtually no risk of harm.[67] Shortly after the opinion ordering the surgical search was rendered, but prior to the surgical search, Lee sought another hearing in federal district court concerning the reasonableness of the search on the basis of changed circumstances.[68]

The changed circumstances concerned reassessment of the medical procedures necessary to remove the bullet. A more thorough medical evaluation indicated that surgical removal of the bullet would require general anesthesia.[69] In its reassessment, the district court noted that the surgery would entail a more substantial medical undertaking.[70] Medical testimony indicated that the use of general anesthesia also increased the risk of the proposed surgical search to the defendant.[71] Upon consideration of the evidence supporting Lee's assertion of changed circumstances, the district court reversed its earlier decision and held the proposed surgical search

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63 Lee v. Winston, 551 F. Supp. 247, 248 (E.D. Va. 1982) [*Lee I*], *aff'd*, 717 F.2d 888 (4th Cir. 1983), *cert. granted*, 104 S. Ct. 1906 (1984).

64 *Id.* The state's motion to compel evidence was granted by the circuit court. The Supreme Court of Virginia refused to grant either a writ of prohibition or a writ of habeas corpus. Consequently, Lee sought relief in federal district court. *Id.* at 248-49.

65 *Id.* at 248, 252.

66 The federal district court applied the *Schmerber* standard as follows:

> (1) there [is] a need for the evidence; (2) there [is] a clear indication the evidence would be found; (3) the procedure [for securing the evidence is] a minor one with "virtually no risk, trauma, or pain;" and (4) the procedure [is] reasonably carried out in a hospital environment by medical personnel.

Id. at 251. *See also supra* note 29; *Schmerber*, 384 U.S. at 770-71.

67 *Lee I*, 551 F. Supp. at 251-52. Specifically, the court noted: (a) the bullet was lodged superficially, 0.5 centimeters below the surface of the skin; (b) the examining physician estimated the risk of harm associated with the removal of the bullet as "one in 10,000 or one in 100,000"; and (c) removal of the bullet could be accomplished under local anesthetic. *Id.*

68 *Id.* at 253, 259.

69 *Id.* at 259.

70 The anticipated surgical incision was revised from 0.5 centimeters in depth by 1.5 centimeters in length to 2.5-3.0 centimeters in depth by 5.0 centimeters in length. *Id.*

71 *Id.*

unreasonable under the fourth amendment.[72]

The most significant aspect of the district court's second opinion was its abandonment of the *Schmerber* standard and adoption of the *Rochin* standard in determining the reasonableness of a search under the fourth amendment.[73] Specifically, the court noted that "the reasonableness of an intrusion turns on the degree and manner of its interference with a person's privacy and dignity."[74] The court invoked the language of *Rochin*, pointing out that "the fact that general anesthetic is involved is very important to the Court's conclusion that the procedures shock the conscience."[75]

The district court, in adopting the *Rochin* standard as controlling, suggested that the medico-legal standard of *Schmerber*[76] was not the proper standard for assessing the fourth amendment reasonableness of surgical searches. Judge Merhige stated that "whether or not a surgeon would characterize the [surgical] procedure as 'minor surgery' is of no moment; there is no reason to suppose that the definition of a medical term of art should coincide with the parameters of a constitutional standard."[77] By rejecting *Schmerber* and grounding its holding on the *Rochin* standard, the district court appeared to be seeking a purely legal standard upon which to base its decision that the proposed surgical search was unreasonable under the fourth amendment.

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72 *Id.* at 261.

73 *Id.* at 260-61.

74 *Id.* at 260.

75 *Id.* at 261.

76 *See supra* notes 41-42 and accompanying text.

77 *Lee I*, 551 F. Supp. at 260. Judge Merhige came close to specifying the central flaw of the major-minor distinction enunciated in *Schmerber*. The flaw is simply that the extent of the bodily intrusion in a surgical search does not vary necessarily or in practice with the anesthesia employed. Thus, as outlined at *supra* note 21, major surgical procedures, which surely are tantamount to major bodily intrusions, occur under local as well as general anesthesia. Conversely, minor surgical procedures, viz. minor bodily intrusions, occur under general as well as local anesthesia.

These points illustrate the difficulty of framing a legal standard for surgical searches on the basis of medical criteria. Courts passing on surgical search cases clearly are attempting to limit such searches to minor bodily intrusions, viz. minor surgical procedures. But they proceed to measure the minor nature of the intrusion by a medical procedure—use of local rather than general anesthesia—that bears no necessary correlation in theory or in practice to what the courts are trying to measure.

If general anesthesia is beyond the limit of reasonableness under the fourth amendment, the authors suggest that it is because there is something in the nature of general anesthesia that offends the value placed by our sociocultural system on the individual, a value built into and protected by our legal establishment through the fourth amendment's prohibition of unreasonable searches and seizures.

B. APPELLATE DECISION

The state appealed the second decision of the district court to the Court of Appeals for the Fourth Circuit.[78] The court of appeals, in a split decision, affirmed the district court decision.[79]

The appellate court's analysis of the fourth amendment reasonableness issue raised by the proposed surgical search illustrates the difficulty a court encounters in deciding which standard, *Rochin* or *Schmerber*, is controlling. Is a general anesthetic surgical search unreasonable because it constitutes major bodily intrusion, defined principally by medical criteria, thereby contravening the *Schmerber* minor intrusion standard? Or, is a general anesthetic surgical search unreasonable, as the district court found, because rendering a person, who is presumed innocent, unconscious against his will for the purpose of probing into bodily tissues for evidence is a scenario that "shocks the conscience" because it comes "too close to the rack and screw" to pass constitutional muster under the *Rochin* standard?[80] Reflective of this difficulty in determining exactly why a general anesthetic surgical search is unreasonable, the appellate court found both standards to have been violated.[81] The problems inherent in returning to the medico-legal standards of reasonableness entailed in the *Schmerber* standard, however, were catalogued at length by Judge Widener in his dissent.[82]

Judge Widener noted that characterization of surgery as major

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78 Lee v. Winston, 717 F.2d 888, 890 (1983) [*Lee II*], *cert. granted*, 104 S. Ct. 1906 (1984).

79 *Id.* at 901.

80 *See Lee I*, 551 F. Supp. at 261. In this regard, Judge Merhige of the district court commented:

> The Court is appalled at the prospect of government[al] authorities rendering a person unconscious, cutting him open, and probing around inside his body for evidence which might, or indeed might not, aid them in convicting him of a crime. . . . The Commonwealth proposes to forcibly subdue petitioner by injection, make a substantial incision into his body, retract muscle tissue in an attempt to locate the subject bullet, and if successful in locating it, extract it from his body. . . . In short, "[t]hese are methods too close to the rack and screw to permit of constitutional differentiation."

Id. (quoting *Rochin*, 342 U.S. at 172).

81 *Lee II*, 717 F.2d at 901. Thus, the majority noted, "[t]he task here, in assessing the state's request to proceed with the surgery, is therefore to determine whether this is a minor intrusion permissible under *Schmerber* or whether it is beyond the pale of permissible police intrusions and thus condemned by *Rochin*." *Id.* at 900. The majority concluded: " 'Considering the scope of the intrusion, the risks involved, and the affront to petitioner's dignity, . . . the procedure contemplated is more akin to the impermissible activity in *Rochin* than to the minor intrusion in *Schmerber*. "These are methods too close to the rack and screw to permit of constitutional differentiation." ' " *Id.* at 901 (quoting *Lee I*, 551 F. Supp. at 261 (quoting in part *Rochin*, 342 U.S. at 172)).

82 *See id.* at 905-08 (Widener, J., dissenting).

or minor is not to be determined solely by the use of general or local anesthesia, but rather by the extent of the risk of harm to a specific patient-defendant.[83] Judge Widener demonstrated that as a matter of fact, the risk factor of the *Schmerber* standard may be no greater for this particular individual under general than under local anesthesia.[84]

The dissent demonstrated the artificial nature of defining major and minor intrusions—unreasonable and reasonable surgical searches—solely on the basis of general or local anesthesia, respectively. If medical knowledge and technique are able to show as a matter of fact that overall risk to a particular patient-defendant under general anesthesia, on balance, is equal to or less than the

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[83] *Id.* at 905, 908 (Widener, J., dissenting). Judge Widener appears to be medically correct in this regard. Whether or not an operation will proceed under local or general anesthesia is not the determining factor in evaluating the potential risk of harm to the patient. The evaluation depends upon "the careful investigation of the patient's physiological status in order to delineate any deviations from the normal that may exist as a result of disease. Pre-anesthetic evaluation begins with the review of the patient's medical history, physical examination findings, and laboratory data." *See* R. GRAY & L. GORDY, *supra* note 21, at § 58.10. Risk associated specifically with the use of anesthesia (as distinguished from risk associated with the surgical procedure itself) is correlated positively with the physiological status of the patient. The healthier and, usually, the younger the patient, the less risk of harm is associated with the use of anesthesia, local or general. R. DRIPPS, J. ECKENHOFF & L. VANDAM, *supra* note 21, at 14-15; R. GRAY & L. GORDY, *supra* note 21, at § 58.13. *See also Lee II*, 717 F.2d at 906.

Medically, the risk of major or minor bodily intrusions resulting from major or minor surgery is an issue separate and distinct from the use of general or local anesthesia. By attempting to correlate the extent of a surgical search with type of anesthesia, the courts have tried to articulate a standard of reasonableness predicated upon medical knowledge and practice while refusing to recognize that anesthesia and extent of bodily intrusion are not related in any legally meaningful way. At the same time, a crucial issue in surgical searches has been obscured. The issue is simply this: reasonableness in medical terms is not reasonableness in legal terms; specifically, it is not reasonableness in terms of the fourth amendment. Thus, the use of general anesthesia in conducting surgical searches may be a major bodily intrusion. If it is, it is not because use of general anesthesia represents a major bodily intrusion with all the attendant surgical risks. It is because general anesthesia offends the dignity and privacy of the defendant's person. *See infra* notes 86-91 and accompanying text.

[84] Citing the testimony of two surgeons, the dissent noted:

> [T]he proposed surgery would be less risky and involve fewer complications under general anesthesia because it would proceed more smoothly. . . . [U]nder general anesthesia the patient's muscles are more relaxed and the patient experiences less pain. Under local anesthesia the muscles would contract when the patient felt pain, making extraction of the bullet and any fragments more difficult. The relaxed state of the patient's muscles under general anesthesia allows retraction of muscle tissue and exposure of the bullet to be accomplished more easily: . . . 'anything that does not have to be cut is not cut.' . . . [In addition,] the chances of the nerve being cut were very small . . . [and] even smaller with general anesthesia because the relaxed state of the muscle tissue allows the surgeon to see the nerves more clearly.

Lee II, 717 F.2d at 905-906 (Widener, J., dissenting) (quoting doctor's testimony).

overall risk under local anesthesia,[85] then the *Schmerber* standard would be satisfied and the search would be reasonable.

This innocuous result can be avoided only if the issue is viewed in different terms. Instead of examining the issue of the reasonableness of the surgical search in terms of the comparative medical risks between local and general anesthesia, it could be examined in terms of the physical, indeed mental, invasion of a presumptively innocent person. By examining the issue in this manner, a legal analysis employing a legal standard is required, rather than a *Schmerber* medico-legal standard supported by an analysis predicated as much on current medical state of the art as on legal standards and analyses. Thus, where the question is one of rendering a presumptively innocent person involuntarily unconscious in order to probe his body to whatever depth necessary to secure a bullet that may or may not be evidence at trial, the *Rochin* standard controls. *Rochin* controls because it is predicated upon certain American values embodied in our Constitution. The prohibition against unreasonable search and seizures as applied to surgical searches through the *Rochin* standard recognizes that surgery performed under general anesthesia, no matter how safe in *Schmerber* terms, on a presumptively innocent, involuntarily unconscious person "shocks the conscience" of a free society.

The fourth amendment prohibition against unreasonable searches and seizures is eloquent testimony to the value accorded to the person. The fourth amendment stands for the proposition that in a free society, the prosecution of those alleged to have committed criminal offenses must be satisfied by methods more consistent with the value this country and its legal system places on the integrity of the individual both in his body and his spirit. For two reasons, rendering a defendant unconscious is not one of these methods. First, insofar as consciousness—that is, an awareness of self and of one's surroundings, the capacity to consider various courses of action and to choose among them, the capacity to think, believe, feel, and judge—is definitive of being human, the involuntary termination of

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[85] Drawing on testimony of an anesthesiologist, a professor emeritus of anesthesiology, and a physician with extensive experience in the surgical removal of bullets, the dissent pointed out that Lee was in the lowest risk category of persons who might receive general anesthetic. *Id.* at 907 (Widener, J., dissenting). The anesthesiologist testified that the risk of harm to Lee in surgically removing the bullet under local anesthetic was one in 50,000. *Id.* (Widener, J., dissenting). But in further testimony, the anesthesiologist stated that "for a given type of patient and surgery, assuming the involvement of a competent anesthesiologist, the *risk of injury*, whether temporary or permanent, or of death is the *same for local and general anesthesia*." *Id.* (Widener, J., dissenting) (emphasis supplied).

consciousness by general anesthesia is a clear affront to the essence of the defendant's humanity. Involuntary unconsciousness stands in opposition to the value accorded to the physical and mental integrity of the individual.

The second reason concerns privacy. Privacy stands as a sentinel to the physical and mental integrity of the individual. A domain of privacy[86] stands between the individual as a private person and the individual as a public person sharing the world with others. It serves as a reminder that the individual is something beyond his membership in the social whole.

The fourth amendment recognizes this domain of privacy by excluding from exposure to public view, through the actions of law enforcement personnel, one's person, home, papers, and effects absent a public need to intrude conceptualized as probable cause.[87] The fourth amendment also protects areas of privacy based upon an individual's expectation of privacy within such areas.[88] If the fourth amendment protects the privacy of the individual with respect to his physical person,[89] to a sphere of private activity,[90] and to zones of privacy defined by an expectation of privacy,[91] it surely protects the privacy of his inner person. Thus, the fourth amendment protects the inner physical and mental person from an involuntary surgical invasion inducing a loss of consciousness—a general anesthetic surgical search. This conclusion is supported by the fact that reasonable searches under the fourth amendment typically are carried out with the full awareness of the person subject to the search.[92] Thus, the person to be searched is aware of the manner by which the

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86 *See* Katz v. United States, 389 U.S. 347, 351-52 (1967); *see also* Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965); Mapp v. Ohio, 367 U.S. 643, 655 (1961); Wolf v. Colorado, 338 U.S. 25, 27-28 (1949).

87 For the text of the fourth amendment, see *supra* note 3.

88 *See* United States v. Karo, 104 S. Ct. 3296, 3303 (1984) (monitoring of beeper in private residence violates fourth amendment rights of those possessing justifiable interest in privacy of the residence); Katz v. United States, 389 U.S. 347, 353 (1967) (justifiable reliance on expectation of privacy in phone booth renders wiretap search unreasonable).

89 *See* Ybarra v. Illinois, 444 U.S. 85, 92-93 (1979) (frisking procedure is serious intrusion on sanctity of person); Terry v. Ohio, 392 U.S. 1, 16-17 (1968) (same holding as in *Ybarra*).

90 *See* United States v. Karo, 104 S. Ct. 3296, 3303 (1984) (private residence comprises sphere of private activity).

91 *See* United States v. Knotts, 460 U.S. 276, 282 (1983) (expectation of private residence privacy does not extend to visual observation of automobile arriving on premises); United States v. Chadwick, 433 U.S. 1, 7 (1977) (warrantless search of lawfully seized footlocker without probable cause to believe locker contained contraband violates fourth amendment protection of legitimate expectations of privacy).

92 An exception is an authorized wiretap to search and seize certain of an individual's personal, private oral communications. *See supra* notes 9-12 and accompanying text.

search is conducted. Within this context, a general anesthetic surgical search is anomalous. It is a dual invasion of privacy not contemplated by the fourth amendment.

The individual who is surgically searched is not aware, nor can he be, of the actual conduct of the search. He does not know, nor can he know, whether or not the extent of the surgical intrusion has become greater than he was told. He does not know, nor can he know, whether or not the physical or mental surgical risk to him has increased as the surgical search has progressed. Unlike other searches, the general anesthesic surgical search entails an invasion of a defendant's inner physical being as well as an invasion of the definitive component of his mental being—his consciousness.[93] Such a dual affront to the individual would seem to be precluded by the value accorded to that individual as guarded by a zone of privacy recognized and protected by the fourth amendment.

The central issue is not, therefore, the extent of a surgical search as a physical intrusion. Rather, the dispositive issue is the manner in which the surgical search is conducted and its necessary result—intrusion into both physical and mental zones of privacy. Surgical searches conducted under general anesthesia, regardless of whether the surgery contemplated constitutes a major or minor intrusion, offend the fourth amendment.

It is this analysis of the fourth amendment, compounded by doubt about the probative value of the bullet and the presumption of innocence, that Judge Merhige, presiding in the *Lee* trial court, embraced when he found the proposed general anesthetic surgical search unreasonable.[94] It is against this same background that the Court of Appeals for the Fourth Circuit found the proposed surgical search an " 'affront to petitioner's dignity.' "[95] It is, we suggest, what the Supreme Court meant in its *Rochin* opinion when it stated that certain invasions of the individual "shock the conscience," being "too close to the rack and screw to permit of constitutional

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Another exception is the drawing of blood from an unconscious driver in order to determine its blood-alcohol content. *See* Breithaupt v. Abram, 352 U.S. 432, 435-36 (1957).

93 Local anesthetic surgical searches are somewhat analogous to the more typical searches conducted pursuant to the fourth amendment. These searches do not involve the dual personal invasion of general anesthetic searches. With local anesthetic searches, the defendant is aware both of the proposed search and the actual conduct of the search. There is an uncontroverted invasion of the defendant's physical being and, hence, of his inner physical privacy. There is, however, no further invasion of his privacy. There is no attack on his mental privacy through a taking of his consciousness by the administration of general anesthesia. *See supra* note 21. *Compare* notes 8-15.

94 *See Lee I*, 551 F. Supp. at 261.

95 *Lee II*, 717 F.2d at 901 (quoting *Lee I*, 551 F. Supp. at 261).

differentiation."[96]

The *Lee* majority's invocation of the *Rochin* standard in further support of its decision, however, suggests a certain awareness that the *Schmerber* standard alone could not support the use of general anesthesia as the bright line separating reasonable from unreasonable surgical searches. Perhaps this explains why the *Lee* majority did not respond to the dissent's application of the *Schmerber* standard as the reason for urging a factual finding that the proposed search would be unreasonable.[97]

An analysis of the *Lee* decision points up the dilemma of *Schmerber* and the fourth amendment significance of *Rochin*. The minor intrusion of *Schmerber* is defined, in part, in terms of risk of harm.[98] The use of general anesthesia may constitute a major or minor intrusion and, hence, an unreasonable or a reasonable search, depending upon the medical expertise available to control the risk of harm.[99] But if the use of general anesthesia is construed as per se violative of the integrity of the person, a construction clearly consistent with the fourth amendment's prohibition against unreasonable searches and seizures, it would remain so regardless of risk of harm, minimal though such risk may be from the medical point of view.[100]

The *Lee* decision appears to have established, at least within the Fourth Circuit, that use of general anesthesia constitutes the bright line between reasonable and unreasonable surgical searches.[101] In support of its decision, the *Lee* majority invoked the *Schmerber* standard as the principal basis of its decision,[102] with reinforcement

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96 *Rochin*, 342 U.S. at 172.

97 *See Lee II*, 717 F.2d at 905, 908 (Widener, J., dissenting).

98 *See Schmerber*, 384 U.S. at 771.

99 Anesthetic risk of harm has been minimized substantially in recent years by the use of pre-anesthetic medication. *See* LAWYER'S MEDICAL CYCLOPEDIA, *supra* note 21, at § 25.16. The purpose of pre-anesthetic medication "is to induce sleep, alleviate apprehension, and produce some degree of reduction in metabolism, thereby *reducing the amount of other anesthetic drugs needed.*" *Id.* (emphasis supplied).

100 In this regard, the *Lee* majority agreed with the district court that a designation of a surgical search as major or minor is not a medical issue but, rather, a legal one. *See Lee II*, 717 F.2d at 900-01. Thus, the majority noted that "a medical designation of this procedure as minor surgery is not controlling . . . . The *judicial inquiry is not to make the medical estimate in medical terms*, but is whether, under the totality of the circumstances presented, *the procedure proposed by the state is constitutionally unreasonable.*" *Id.* (emphasis supplied).

101 The dissent viewed the majority's opinion as going beyond establishing a bright line separating reasonable and unreasonable searches. The dissent construed the opinion as establishing a per se unreasonable rule against general anesthetic surgical searches. *Id.* at 908 (Widener, J., dissenting).

102 The court found that "[t]he basic principle is that, once the state has demonstrated the relevancy of evidence and the inability to obtain it otherwise, the reasonableness of removing it forcibly from a person's body is judged by the extent of the surgical intru-

drawn from the *Rochin* standard.[103] But as noted above, it is the reliance on the *Schmerber* standard that weakens the *Lee* decision.[104] The *Schmerber* standard is a contingent standard—contingent upon medical advances that may reduce the risk of harm associated with general anesthesia such that the minor intrusion linchpin of the standard is met. Any bright line constructed on a contingent standard is vulnerable to erosion.

The failure of the *Lee* majority to ground its decision on the *Rochin* standard opens it to challenge as soon as prosecutors are able to prove that the medical risk of general anesthesia is on a par with that of local anesthesia generally, or at least with respect to a particular suspect. Thus, if the *Lee* decision is to become the basis for vindicating the value accorded by the fourth amendment to the integrity of the person, two further steps are required. The first step is an articulation of a per se rule that general anesthetic surgical searches are unreasonable under the fourth amendment and the *Rochin* rationale. The second step is an articulation of a rebuttable presumption that local anesthetic surgical searches are per se unreasonable based on *Schmerber* as expanded by *United States v. Crowder*.[105] The integrity of the person remains a fourth amendment concern even when a proposed surgical search is to be performed under local anesthesia. Because local anesthetic surgeries are not necessarily minimal bodily intrusions, the exact character of a proposed local anesthetic surgical search merits greater scrutiny by the courts than has been extended heretofore.[106]

IV. Proposed Rules Governing Surgical Searches

A. General Anesthetic Surgical Searches

This review of the surgical search cases indicates that courts have determined fourth amendment reasonableness in terms of the type of anesthesia, local or general, required to perform the

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sion and the extent of the risks to the subject." *Id.* at 899. *See also* United States v. Crowder, 543 F.2d 312, 316 (D.C. Cir. 1976).

103 *Lee II*, 717 F.2d at 900-01.

104 *See supra* notes 83-85 and accompanying text.

105 543 F.2d at 316.

106 [During the process of the *Journal*'s publication of this Article, the Supreme Court handed down a unanimous decision in *Winston v. Lee*. *See* Winston v. Lee, 53 U.S.L.W. 4367 (1985). The Court employed its *Schmerber* framework in balancing the disputed medical risks to Lee and the intrusion on his privacy interests against the absence of a compelling need on the part of the state to use the bullet as evidence. *Id.* at 4368-70. The Supreme Court held the proposed search unreasonable under the fourth amendment and affirmed the appellate decision. *Id.* at 4370.—ed.]

search.[107] No court to date has permitted a surgical search requiring general anesthesia.[108] Thus, a fair conclusion to draw is that the courts have fashioned a de facto per se rule against general anesthesia. This conclusion is warranted particularly in the Fourth Circuit as a consequence of the *Lee* decision.[109]

The rationale for the rule against the use of general anesthesia in surgical searches is critical. The rationale chosen must be able to resist such factual proof as would render a general anesthetic surgical search reasonable in the opinion of reviewing courts. Indeed, it must be one that precludes general anesthetic surgical searches as a matter of law rather than as a matter of fact. The *Schmerber* standard, by tying the determination of reasonableness to medical technology, renders a matter-of-fact rationale.[110] As such, it simply postpones the time at which general anesthetic surgical searches, as a matter of fact, become safe enough to fall on the minor intrusion side of the major-minor dichotomy drawn by the *Schmerber* Court.[111]

The Supreme Court itself has resisted, on various occasions, the efforts of appellate litigators to wed legal principles to matters of fact resolved not by law, but rather by facts and their interpretation drawn from nonlegal disciplines.[112] Where the Court has not resisted these attempts, the outcome has been confusion over the independent validity of the resulting legal principles when new evidence is later generated by nonlegal sources that can undermine

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107 *See Lee II*, 717 F.2d at 900-01; *Crowder*, 543 F.2d at 313-17; *Lee I*, 551 F. Supp. at 259-60; *Bowden*, 256 Ark. at 824, 510 S.W.2d at 881; *Smith*, 80 Misc. 2d at 215, 362 N.Y.S.2d at 911-12; *Allen*, 277 S.C. at 603, 291 S.E.2d at 462-63.

108 *See Lee II*, 717 F.2d at 899-901; *Lee I*, 551 F. Supp. at 259-60; *Bowden*, 256 Ark. at 824, 510 S.W.2d at 881; *Adams*, 260 Ind. at 669, 299 N.E.2d at 838; *Smith*, 80 Misc. 2d at 215, 362 N.Y.S.2d at 914; *Allen*, 277 S.C. at 603, 291 S.E.2d at 463 (as to defendant Childers). Conversely, where there is no other constitutional infirmity, courts have validated surgical searches that have been or would be performed under local anesthesia. *See, e.g., Crowder*, 543 F.2d at 315; *Doe*, 409 So. 2d at 28; *Creamer*, 229 Ga. at 514-15, 192 S.E.2d at 352-53; *Lawson*, 187 N.J. Super. at 29-30, 453 A.2d at 558; *Allen*, 277 S.C. at 603, 291 S.E.2d at 463 (as to defendant Allen).

109 *See Lee II*, 717 F.2d at 908 (Widener, J., dissenting).

110 This conclusion is supported by the dissent in *Lee*. *See id.* (Widener, J., dissenting).

111 *Id.* (Widener, J., dissenting). *See also* R. DRIPPS, J. ECKENHOFF & L. VANDAM, *supra* note 21, at 14-15; R. GRAY & L. GORDY, *supra* note 21, at § 58.13. Based on the standard classification of physical status as an indicator of successful surgery promulgated by the American Society of Anesthesiologists, general anesthetic surgical searches are safe enough to be considered minor bodily intrusions where minor is defined in terms of survival and full recovery. *See* R. DRIPPS, J. ECKENHOFF & L. VANDAM, *supra* note 21, at 14-15.

112 *See, e.g.*, Craig v. Boren, 429 U.S. 190, 204, 208-09 & n.22 (1976) (rejecting use of statistical evidence by Oklahoma in support of differential drinking ages by sex). Justice Brennan, for the Court, noted: "But this merely illustrates that proving broad sociological propositions by statistics is a dubious business and one that inevitably is in tension with the normative philosophy of the Equal Protection Clause." *Id.* at 204.

the very legal principles that such evidence originally was used to establish.[113]

Illustrative of this tension between legal principles and the threat of their erosion by nonlegal evidence are the Court's decisions in the area of abortion.[114] As Justice O'Connor pointedly noted in her dissent in *City of Akron v. Akron Center for Reproductive Health*,[115] medical knowledge and technology have destroyed the two standards established in *Roe v. Wade*[116] that define the pregnant woman's unfettered substantive due process right to make an abortion decision. This result is possible because the right established in *Roe v. Wade* is, in actuality, founded less upon substantive due process jurisprudence than it is upon the capacity of medical technology to relocate the point of fetal viability earlier into pregnancy.[117]

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113 *See, e.g.*, City of Akron v. Akron Center for Reproductive Health, 103 S. Ct. 2481 (1983) (invalidating locally imposed restrictions on abortion). Justice O'Connor, in dissent, took issue with the majority's reliance on constantly revised medical standards and noted, "it is clear that the trimester approach violates the fundamental aspiration of judicial decision making through the application of neutral principles 'sufficiently absolute to give them roots throughout the community and continuity over significant periods of time. . . .'" 103 S. Ct. at 2507 (O'Connor, J., dissenting) (quoting A. Cox, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 114 (1976)) (elipsis in original).

114 *See* Roe v. Wade, 410 U.S. 113, 148-49 (1973). *See also* Harris v. McRae, 448 U.S. 297, 312-18 (1980); Bellotti v. Baird, 443 U.S. 622, 642 (1979); Colautti v. Franklin, 439 U.S. 379, 392-94 (1979); Maher v. Roe, 432 U.S. 464, 472-75 (1977); Beal v. Doe, 432 U.S. 438, 445-46 (1977); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 63-65 (1976).

115 103 S. Ct. at 2505-07 (O'Connor, J., dissenting).

116 410 U.S. at 164. In articulating the woman's right to make an abortion decision, the Court stated: "For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." *Id.* at 164. Thus, even the recognition of the constitutional right to make an abortion decision is predicated as much on the judgment of physicians, a judgment itself grounded in prevailing medical knowledge and technology, as it is on constitutional principles of substantive due process. Justice O'Connor elaborated on this point in her dissent in *Akron Center for Reproductive Health*:

> The *Roe* framework, then, is clearly on a collision course with itself. As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception. . . . The *Roe* framework is inherently tied to the state of medical technology that exists whenever particular litigation ensues.

103 S. Ct. at 2507 (O'Connor, J., dissenting).

117 *See Akron Center for Reproductive Health*, 103 S. Ct. at 2507 (O'Connor, J., dissenting); *Danforth*, 428 U.S. at 64; *Roe*, 410 U.S. at 163-65. Thus, the fourteenth amendment's substantive due process right to privacy, which permits and protects a woman's abortion decision, is a contingent right. It is contingent *not* upon the legally derived constitutional meaning of the right to privacy, but rather upon two inherently contradictory lines of medical expertise and technology. One line of medical authority has made abortions safe into the second trimester, *see Akron Center for Reproductive Health*, 103 S. Ct.

The promulgation of dependent legal principles—principles built with one foot in the law and one foot in medicine, the social sciences, engineering, or some other nonlegal domain—generates uncertainty and confusion. Legal principles and their measuring standards ought to change primarily as a consequence of the need to apply them to changed circumstances, arising within the sociocultural system and presented to the courts by the vehicle of litigation. As mediator of litigious disputes precipitated by extralegal changes, the judiciary proceeds by applying principles and standards independent of the factual positions it must adjudicate. The law, as promulgated by the judiciary, is accepted and implemented because it is derived from legal principles and standards, rather than from a skillful but partisan edifice of legal principles and standards generated by legal advocates to reflect the most recent nonlegal state of knowledge or of art.

The significance of independent legal resolutions to legal issues seems clear. As applied to surgical search cases, general anesthetic surgical searches are unreasonable on the basis of legal principles and standards, rather than on the basis of contemporary or anticipated medical knowledge and technology. Regardless of how safe such searches are or come to be, the fact that presumptively innocent persons can be rendered involuntarily unconscious to undergo surgery that will facilitate the government's search for evidence, the probative value of which remains to be determined definitively, will not cease to breach the integrity of the person, offending the fourth amendment per se and the principles of liberty upon which the fourth amendment is based. The *Rochin* standard is a defensible, independent constitutional rationale that is available to support conversion of the prevailing de facto per se rule against general anesthetic surgical searches into a de jure per se rule.

B. LOCAL ANESTHETIC SURGICAL SEARCHES

Local anesthetic surgical searches are not free from concern regarding their reasonableness under the fourth amendment. The *Crowder* test,[118] which builds upon the *Schmerber* standard and has

at 2496, thus expanding the right. The other line of medical authority has established an earlier point of fetal viability, *see id.* at 2507 & n.5 (O'Connor, J., dissenting), thereby simultaneously contracting the right just expanded by a sister branch of the medical profession.

[118] *See Crowder*, 543 F.2d at 316. The court in *Crowder* enunciated the following test:

> (1) The evidence sought [is] relevant, could [be] obtained in no other way, and there [is] probable cause to believe that the operation would produce it; (2) the operation [is] minor, [is] performed by a skilled surgeon, and every possible precaution [is] taken to guard against any surgical complications, so that the risk of perma-

been utilized as the basis of decisions in subsequent surgical search cases,[119] indicates a commitment by the courts to closely scrutinize local anesthetic surgical searches. Because involuntary local anesthetic surgery raises some of the same problems as involuntary general anesthetic surgery—bodily intrusions performed on presumptively innocent persons—similar attention to fourth amendment safeguards appears warranted. To this end, the following revisions of the *Schmerber-Crowder* test are suggested:

1. Establishment of a rebuttable presumption against the reasonableness of local anesthetic surgical searches;
2. The presumption may be rebutted in an adversarial hearing where the accused is represented by counsel;
3. The bullet sought by the state must constitute necessary, not simply relevant, evidence for the prosecution of the accused;
4. The definitive element of the minor nature of the surgical search is that the bullet must be subject to safe removal under the local infiltration use of local anesthesia;
5. Once the prosecution establishes that the surgical search can be performed safely under local infiltration local anesthesia, the burden remains upon the prosecution to satisfy the court that there is no risk of harm to the accused from the surgery itself; and
6. If the state is able to rebut the presumption, appellate review shall be afforded to the accused prior to execution of the surgical search.[120]

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nent injury [is] minimal; (3) before the operation [is] performed the [trial] court [holds] an advers[arial] hearing at which the defendant appear[s] with counsel; [and] (4) thereafter and before the operation [is] performed the defendant [is] afforded an opportunity for appellate review.

Id.

119 *See Martin*, 404 So. 2d at 962; *Richards*, 585 S.W.2d at 506; *Overstreet*, 551 S.W.2d at 626-28; *Lawson*, 187 N.J. Super. at 29-30, 453 A.2d at 558.

120 The first element of the revised *Schmerber-Crowder* test is new. The third element constitutes a change in the test by requiring that the bullet being sought as evidence bear a greater probative value—that it be *necessary* to the state's case—than has been the case to date.

The change suggested in the fourth element of the test is the most significant. It specifically precludes surgical removal of a bullet under regional local anesthesia. *See supra* note 21.

Major surgical procedures in terms of the extent of bodily intrusion and associated surgical risks are performed under local anesthesia employed in a regional capacity. Thus, only local infiltration local anesthesia (local anesthesia applied by injection to the peripheral nerves of a delimited surgical site) would be permitted under the revision being suggested. *See* LAWYER'S MEDICAL CYCLOPEDIA, *supra* note 21, at § 25.28. Under local infiltration local anesthesia, not only is the affected area of the body relatively small but the surgeries to be performed are limited to minor procedures involving only a superficial penetration of bodily tissue. *See id.*; R. DRIPPS, J. ECKENHOFF & L. VANDAM, *supra* note 21, at 242.

It should be noted that without direct acknowledgement, the courts hearing surgical search cases have permitted only such surgical searches as are performed under local infiltration local anesthesia. *See Crowder*, 543 F.2d at 313-15; *Hughes*, 429 A.2d at 1340; *Doe*, 409 So. 2d at 28; *Creamer*, 229 Ga. at 514-15, 192 S.E.2d at 352; *Allison*, 129 Ga. App. at 365, 199 S.E.2d at 588-89; *Allen*, 277 S.C. at 603, 291 S.E.2d at 463. But by

The application of a more stringent test to proposed local anesthetic surgical searches will accord paramount importance to the value placed by the American sociocultural system, and the fourth amendment of the Constitution, on the physical and mental integrity of the person. It also recognizes the interest of society in taking effective action against the perpetrators of crime. The suggested revision of the *Schmerber-Crowder* test strikes a defensible balance between these two competing interests central to a free society. It places a more substantial burden of proof on the state than does the current *Schmerber-Crowder* test, thereby protecting the personhood of the accused. Yet it clearly acknowledges that the burdens imposed on the state can be sustained, thereby insuring that the interests of society in safety and protection from crime will be served.

V. CONCLUSION

Surgical searches, conducted under either local or general anesthesia, are inimical to values central to this country and made manifest in its legal institution through the Constitution. Fostering these values while protecting others requires a revision of the prevailing rules governing both types of surgical searches.[121]

This Article has proposed two such revisions. With respect to general anesthetic surgical searches, it has argued that these searches are per se unreasonable under the fourth amendment and has suggested adoption of a de jure per se rule against such searches. With respect to local anesthetic surgical searches, this Article has suggested that a rebuttable presumption of unreasonable-

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making this fact a criteria of the *Schmerber-Crowder* test, it will be easier to avoid any possible drift into the more extensive surgical searches that clearly can be performed under local anesthesia. *See, e.g., Richards*, 585 S.W.2d at 506 (affirming surgical search for bullet lodged in defendant's hip four inches below surface of skin); *Lawson*, 187 N.J. Super. at 29-30, 453 A.2d at 558 (affirming surgical search for bullet located in defendant's thigh three-quarters to one inch below surface of skin).

[121] These proposed rules hold significant practical consequences. First, they would simplify the decisionmaking process regarding surgical searches under either local or general anesthesia. Where expert medical testimony indicates that a surgical search can be conducted under a local infiltration use of local anesthesia, the decisionmaking process proceeds according to the revised *Schmerber-Crowder* test. *See supra* note 120 and accompanying text. Where expert medical testimony indicates that a surgical search requires general anesthesia or regional use of local anesthesia, the inquiry is immediately and effectively terminated. Because the process of decision is simplified, the amount of judicial time allocated to ruling on motions to compel evidence would be minimized. Furthermore, under the rules proposed by this Article, the fourth amendment analysis and determination of any proposed surgical search will be the same in all courts regardless of the circumstances of the case beyond the type of anesthesia to be used and its mode of induction.

ness be established along with adoption of stricter standards for rebutting the presumption.